

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
M&M MANAGEMENT CO., INC.	:	DETERMINATION
	:	DTA NO. 813328
for Revision of a Determination or for Refund	:	
of Tax on Gains Derived from Certain Real	:	
Property Transfers under Article 31-B of the	:	
Tax Law.	:	

Petitioner, M&M Management Co., Inc., P.O. Box 234442, Great Neck, New York 11023, filed a petition for revision of a determination or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law.

Petitioner and the Division of Taxation consented to have the controversy determined on submission without hearing. Documents and briefs were filed by the parties. Petitioner's reply brief was filed on May 17, 1996 which began the six-month statutory period for issuance of this determination. Petitioner appeared by Howard M. Koff, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Peter T. Gumaer, Esq., of counsel). Jean Corigliano, Administrative Law Judge, renders the following determination.

ISSUE

Whether the time for the Division of Taxation to issue a notice of determination of tax due to this condominium developer began to run from the date of the last transfer of a condominium unit or from the date of filing of the 100 percent project update.

FINDINGS OF FACT

1. Petitioner, M&M Management Co., Inc., and the Division of Taxation ("Division") entered into a stipulation of facts. The facts stipulated to have been incorporated into Findings of Fact "3", "4" and "5". Additional facts have been found to create a more complete record.

2. The Division issued to petitioner a Notice of Determination, dated October 27, 1992, assessing tax due under Article 31-B of the Tax Law in the amount of \$339,670.00 plus penalty

and interest. The computation section of the notice states that the tax is due for the period ended October 15, 1985. The Division issued a Conciliation Order, dated September 23, 1994, reducing the tax assessment to \$224,103.00 plus penalty and interest. The Conciliation Order states that the period covered by the assessment is September 15, 1985 through June 4, 1987. The parties did not explain or raise any issues regarding the assessment period.

3. The only issue in this proceeding is whether the Division's notice is barred by the three-year statute of limitations provided in Tax Law § 1444(3)(a)(1).

4. Petitioner was the sponsor of a condominium plan. "The date of the last condominium unit sale was June 4, 1987. The date of filing of the 100% project update was December 28, 1989." (Stipulation ¶ 2). "The required pre-transfer questionnaires (i.e., TP-702 and TP-581) were filed in advance of the June 4, 1987 transfer date" (Stipulation ¶ 3).¹

5. The parties agree that the assessment of tax is barred by the statute of limitations if the statutory period for assessment began to run from the date of the last unit sale (June 4, 1987). They also agree that the assessment is not barred by the statute of limitations if the statutory period for assessment began to run upon the filing of the project update (December 28, 1989).

6. The questionnaires referred to in paragraph 3 of the stipulation were not made a part of the record by the parties; therefore, the number and the exact contents of those returns are not known.

7. By letter dated September 20, 1989, the Division advised petitioner that the condominium project which is the subject of the assessment was under audit. The Division asked petitioner to provide it with an "up to date status on the project totals"; a construction schedule for phase II of the project; and the construction management fees.

8. On December 28, 1989, petitioner filed forms DTF-700, DTF-701, DTF-703 and DTF-702 showing a 100% sellout of all condominium units. Those forms show anticipated

¹Form TP-581 is a Transferee Questionnaire which must be filed with the Transferor Questionnaire before the date of transfer. There is no form TP-702. Presumably, the parties meant form DTF-702, Real Property Transfer Gains Tax Unit Submission Questionnaire for Cooperatives and Condominiums.

gross consideration on the entire project of \$11,043,600.00 and actual consideration at sellout in the same amount. Petitioner reported anticipated and actual gain of \$1,730,213.00. Gains tax in the amount of \$173,021.00 had been paid as of the update.

9. Petitioner executed two consents extending the period of limitation for assessment of real property transfer gains tax. The first consent was signed on October 15, 1990 and extended the assessment period to October 27, 1991. The second consent was signed on October 1, 1991 and extended the final assessment date to October 27, 1992. If the statute of limitations began to run from June 4, 1987, the assessment period expired before the first consent was executed.

10. The Division performed an audit after the issuance of the notice of determination. A schedule in the workpapers shows that the Division verified transfers of 72 condominium units and 48 garage units in the period September 15, 1985 through June 4, 1987. Six units were transferred on June 4, 1987, and it appears from the amount of consideration received for each unit (less than \$10,000.00 each) that those six were garage units. According to the audit workpapers, the total number of units actually transferred is in agreement with the number listed in the condominium offering plan.

11. As a result of its audit, the Division concluded that actual consideration received on the entire project was \$10,463,000.00. The Division also determined that the gains tax on each unit transfer had been paid by the transferees in accordance with the offering plan and increased consideration by an additional \$146,482.00 based upon this provision. The Division adjusted petitioner's calculation of original purchase price, acquisition fees, conversion costs, selling expenses and brokerage fees. These adjustments account for the full amount of additional tax due, \$224,103.00, as determined after the notice was issued. The tax due was apportioned to each unit transferred and penalty and interest due on each transfer was calculated from the date of transfer of the individual unit. The parties agree that no units were transferred after June 4, 1987.

12. As of June 1985, the Division published real property gains tax questionnaires for cooperatives and condominiums and instructions for completing those questionnaires. A

booklet entitled "Instructions for Completing The Real Property Transfer Gains Tax Questionnaires for Cooperatives and Condominiums Forms DTF-701 and DTF-702 " (DTF-701-I [6/85], hereinafter "Instructions") contains an explanation of all forms to be filed in connection with transfers pursuant to condominium and cooperative plans.

Form DTF-701 must be filed by the transferor as an initial filing, i.e., before the first transfer pursuant to the plan, and for project updates. Its purpose is to establish the anticipated gain pursuant to the plan.

Form DTF-700 must be attached to and filed with the form DTF-701. Its purpose is to establish the various costs and activities that comprise the original purchase price for transfers pursuant to a condominium or cooperative plan.

Form DTF-702 is the form used to report the amount of tax due per unit using an allocation formula determined by the Division. This form must be filed for each unit before the transfer of such unit.

Form TP-581 is used to report the actual consideration to be paid for each unit. It must be completed by the transferee and attached to and filed with the form DTF-702.

13. Petitioner's gains tax filing record cannot be determined from the documents in evidence. It is not known whether petitioner filed forms DTF-700 and DTF-701 before the transfer of the first condominium unit in September 1985. It can be surmised that gains tax was paid on individual unit transfers as they occurred. The auditor's letter of September 20, 1989 indicates that before the audit began she had information available to her which would most likely have come from the filing of forms DTF-700 and DTF-701 and supporting documentation. Based on these inferences from the record, it is concluded that petitioner filed forms DTF-700 and DTF-701 before June 4, 1987. Because of the nature of the issue, it is also concluded that petitioner filed forms DTF-702 and TP-581 for the six units transferred on June 4, 1987 but did not file forms DTF-700 and DTF-701 alerting the Division to the fact that the condominium project had been completely sold out.

CONCLUSIONS OF LAW

A. Tax Law § 1444² provides, as relevant:

"(1) If a form required by this article is not filed, or if a form when filed is incorrect or insufficient, the amount of tax due shall be determined by the commissioner of taxation and finance from such records as may be obtainable. . . .

* * *

"(3)(a) Statute of limitations. (1) General. No assessment of additional tax under this article shall be made after the expiration of three years from the date of transfer, or in the case of a transfer pursuant to a condominium or cooperative plan or an aggregated transfer, after the expiration of three years from the date of the last transfer made pursuant to such plan or aggregated transfer, unless the questionnaires required by section fourteen hundred forty-seven of this article . . . is filed after the date of transfer, in which case the tax may be assessed at any time within three years after the date on which such questionnaires or affidavit is filed." (Emphasis added.)

Tax Law § 1447 provides, as relevant here:

"1. (a) The commissioner of taxation and finance shall make available forms which he shall prescribe, to be completed by each transferor and transferee

* * *

"(d) Such forms shall be filed with the state tax commission in accordance with the pre-transfer audit procedure established by the commissioner of taxation and finance pursuant to subdivision two of this section.

* * *

"2. The department of taxation and finance shall make available as soon as practicable a pre-transfer audit procedure to be applicable to all transfers subject to tax under this article. Pursuant to such procedure, the department shall determine a tentative assessment of the tax to be levied hereunder. . . . The tentative assessment of the amount of tax due shall not be deemed to be a determination of the actual amount of tax due." (Emphasis added.)

The only issue in this case is whether the Division's notice of determination is barred by the three-year statute of limitations set forth in Tax Law § 1444(3)(a). The parties have stipulated that "the last transfer made pursuant to [the condominium offering plan]" (Tax Law § 1444[3][1]) was made on June 4, 1987. Since the Division's notice of determination was

²Article 31-B of the Tax Law was amended several times during the period covered by this proceeding. No substantive changes were made to the provisions cited in this determination which would affect the outcome of this proceeding. Citations are to the statute currently in effect unless otherwise indicated.

issued on October 27, 1992, it was not issued within three years of the last transfer. It may be deemed timely only if it is found that it was issued within three years of petitioner's filing of a questionnaire required by Tax Law § 1447. Petitioner claims that the questionnaires referred to in Tax Law § 1447 are pre-transfer questionnaires and that it filed all such forms in advance of the last transfers occurring on June 4, 1997. Petitioner takes the position that "a 100% Project Update, quite obviously and by definition, deals with post-transfer matters" and is not a form required by Tax Law § 1447 (Petitioner's brief, emphasis in original). The Division's position is that the statutory period commenced on December 28, 1989 when petitioner filed forms 700, 701, 703 (a supplemental worksheet) and 702 in accordance with the Division's request for an up-to-date status report on the project sales.

For the following reasons, I find that the Division's notice of determination is not barred by the statute of limitations.

B. Article 31-B of the Tax Law imposes a ten percent tax on gain derived from the transfer of real property (Tax Law § 1441[1]). For purposes of the gains tax, a transfer includes partial or successive transfers pursuant to a cooperative or condominium plan (Tax Law § 1440[7][b][iii]; see also, Matter of Mayblum v. Chu, 67 NY2d 1008, 503 NYS2d 316). However, the transfer gains tax is imposed on the overall condominium or cooperative plan, rather than on the individual units offered for sale pursuant to such a plan (Matter of Mayblum v. Chu, supra; Matter of 1230 Park Assocs. v. Commr. of Taxation & Fin. of State of N.Y., 170 AD2d 842, 843, 566 NYS2d 957, lv denied 78 NY2d 859, 575 NYS2d 455).

Tax Law § 1442, in effect when the relevant transfers occurred, provides, in pertinent part, that:

"(a) General. The tax imposed by this article shall be paid . . . no later than the fifteenth day after the date of transfer. . . .

"(b) In the case of a transfer pursuant to a cooperative or condominium plan, the date of transfer shall be deemed to be the date on which each cooperative or condominium unit is transferred. . . . For purposes of calculating the amount of tax due . . . pursuant to a cooperative or condominium plan, an apportionment of the original purchase price of the real property and total consideration anticipated under such cooperative or condominium plan . . . shall be made for each such cooperative or condominium unit. . . ."

In accordance with this provision, the gains tax is required to be paid as each individual condominium unit is transferred, even though the tax is ultimately computed on the overall gain from the condominium sales (see, Mayblum v. Chu, supra).

The Division is authorized by Tax Law § 1147 to establish a pre-transfer audit procedure and to require the filing of any forms it deems necessary in accordance with that procedure. To effectuate the statutory scheme which requires payment of the transfer gains tax as the individual condominium units are transferred, although the tax is ultimately computed on the overall gain from the condominium plan, the Division established the Option B method of tax calculation for cooperative and condominium plans.³

Under Option B, the transferor is required to file certain documents relating to the entire condominium project 20 days before the first transfer of any individual unit. In this filing, the transferor is required to estimate the anticipated selling price of all the units in the condominium offering plan and to provide a statement explaining the basis used to determine this estimate of consideration (see, Instructions for Forms DTF-701 and DTF-702). Specifically, the transferor is required to file forms DTF-700 and DTF-701, which are used to estimate the anticipated gain on the entire plan and to determine a method for allocating the gain to each unit transferred, and form DTF-702, which is used to report the tax due per unit based on the established method of apportionment. To report the actual consideration to be paid for each condominium unit, each transferee must complete form TP-581 (Transferee's Questionnaire). The form TP-581 and the form DTF-702 must be filed for each unit prior to the transfer of that unit. The original purchase price, anticipated total consideration and the anticipated gain subject to tax is apportioned to each unit sold. The gains tax is required to be paid based on that unit's allocable share of the anticipated gain at the time of its transfer. At the 50%, 75% and 100% sell-out points, the transferor is required to update his or her initial filings (forms DTF-700 and 701) and to recalculate the anticipated consideration, the original purchase price, and, hence, the gain anticipated under the plan. The anticipated consideration at each

³The Division initially established two optional methods, but Option B has been the only method available for gains tax filings made for condominiums after August 1, 1986 (TSB-M-[2]-R).

update point is the sum of the actual consideration received to date and the total consideration anticipated on the remaining units (see, Form DTF-701 and Instructions). The remaining tax due is then apportioned to the unsold units until all units are sold.

Petitioner's claim that the update filings are not questionnaires required to be filed under Tax Law § 1447 is rejected. The questionnaires that the Division requires to be filed can be separated into two categories--those used to determine gain subject to the gains tax on the overall project (forms DTF-700 and DTF-701) and those used to report the actual consideration paid for an individual unit and the tax due on that individual transfer at the time of the transfer (forms DTF-581 and DTF-702). The first group of forms must be filed before the first condominium unit is transferred and at certain sellout points. The second group is filed prior to the transfer of each individual unit. Apparently, it is petitioner's contention that only forms DTF-702 and TP-581 are questionnaires required to be filed under Tax Law § 1447. Petitioner is wrong. The amount of tax due, as reported on form DTF-702, is determined by reference to information provided on forms DTF-700 and DTF-701; therefore, the latter forms are essential components of the pre-audit transfer procedure. Undoubtedly, the Division has the authority to require the filing of forms DTF-700 and DTF-701 before the transfer of each unit. In the exercise of its discretion, it has only required that these forms be "updated" at certain designated sellout points. These "updates" enable the Division to revise the original tentative assessment as necessary. The tentative assessment of the amount of tax due is not a final determination pursuant to Tax Law § 1444. The final determination of tax due pursuant to the overall condominium plan can only be made after the transferor has transferred his or her complete interest in the condominium project (compare, Matter of 25 Tudor Associates, Tax Appeals Tribunal, June 18, 1992 [where the Tribunal held that the Division need not wait until the 100% sellout point to issue a notice of determination and may issue a notice assessing tax on individual unit transfers]). As the Division notes, this is only logical since tax due on the overall plan cannot be determined until all units are sold and the actual consideration and original purchase price can be determined. The Division's requirement that forms DTF-700 and

DTF-701 be updated at the point of sellout is also consistent with the overall scheme of the gains tax which imposes the tax on the overall condominium plan.

C. The statute of limitations is an affirmative defense. The burden of proof is on the party raising the defense to go forward with a prima facie case showing the date on which the limitations period began and the expiration of that period (see, Matter of Pittman, Tax Appeals Tribunal, February 20, 1992 and cases cited therein). To prove that the statute of limitations began to run on June 4, 1987, it was incumbent upon petitioner to establish that all questionnaires "required" by Tax Law § 1447 were filed on June 4, 1987. Petitioner has failed to do so. As discussed above, updated forms DTF-700 and 701, filed at the point of 100% sellout of the transferor's interest in the real property, are among those questionnaires required to be filed by Tax Law § 1447. Although the parties stipulated that "[t]he required pre-transfer questionnaires (i.e., TP-702 and TP-581) were filed in advance of the June 4, 1987 transfer date" (Stipulation ¶ 3), this statement cannot be interpreted to mean that all questionnaires required by section 1447 were filed before June 4, 1987. Other statements in the stipulation establish that petitioner did not file the updated forms DTF-700 and DTF-701 at the 100% sellout point. Accordingly, the statute of limitations did not begin to run until those forms were filed on December 28, 1989.

D. The petition of M&M Management Co., Inc. is denied, and the notice of determination dated October 27, 1992, as modified by the Conciliation Order dated September 23, 1994, is sustained.

DATED: Troy, New York
November 7, 1996

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE